SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2004-000231-001 DT 11/23/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

4716 INC

RICHARD J HERTZBERG

v.

ARIZONA STATE DEPARTMENT OF LIQUOR LICENSES AND CONTROL (001)

CHRISTOPHER A MUNNS

OFFICE OF ADMINISTRATIVE HEARINGS

MINUTE ENTRY

Pursuant to A.R.S §12-910(e) this court may review administrative decisions in special actions and proceedings in which the State is a party:

> The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

The scope of review of an agency determination under administrative review places the burden upon the Plaintiff to demonstrate that the agency's decision was arbitrary, capricious, or involved an abuse of discretion.[1] The reviewing court may not substitute its own discretion for that exercised by the agency,[2] nor may it act as the trier of fact,[3] but must only determine if there is any competent evidence to sustain the decision.[4] This court may not function as "super

[1] *Sundown Imports, Inc. v. Ariz. Dept. of Transp.*, 115 Ariz. 428, 431, 565 P.2d 1289, 1292 (App. 1977); *Klomp v. Ariz. Dept. of Economic Security*, 125 Ariz. 556, 611 P.2d 560 (App. 1980).
[2] *Ariz. Dept.of Economic Security v. Lidback*, 26 Ariz. App. 143, 145, 546 P.2d 1152, 1154 (1976).
[3] *Siler v. Arizona Dept. of Real Estate*,193 Ariz. 374, 972 P.2d 1010 (App. 1998).
[4] *Schade v. Arizona State Retirement System*, 109 Ariz. 396, 398, 510 P.2d 42, 44 (1973); *Welsh v. Arizona State Board of Accountancy*, 14 Ariz.App. 432, 484 P.2d 201 (1971).

agency" and substitute its own judgment for that of the agency where factual questions and agency expertise are involved.[5]

This matter has been under advisement and I have considered and reviewed the record of the proceedings from the administrative hearing, exhibits made of record and the memoranda submitted. Here, Plaintiff, 4716 Inc; Hi Liter Cocktail Lounge, seeks review of the Arizona State Department of Liquor Licenses and Control's (hereinafter the "Department") administrative order. After a careful review of the record, I find that I must reverse the decision of the Department.

Only where the administrative decision is unsupported by competent evidence may this court set it aside as being arbitrary and capricious.[6] In determining whether an administrative agency has abused its discretion, I review the record to determine whether there has been "unreasoning action, without consideration and in disregard for facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached."[7]

Facts

The facts in this case are not in dispute. In April of 2003, a Phoenix police officer conducted an undercover investigation in Plaintiff's erotic dancing establishment. In the course of the investigation, an erotic dancer named "Talon" approached the undercover officer, told him she needed a break, and told the officer to buy her a beer. Talon left the officer and went into the dressing room to change out of her dance costume. Talon returned from the break room, wearing street clothes, then sat beside the officer and drank the beer he had purchased for her. Talon asked the officer if he would like her to perform a table dance for him. The officer indicated that he would like her to perform for him, so Talon returned to the dressing room, changed into her dance costume, and then performed three tables dance for the officer. Plaintiff was charged with violating A.R.S. §4-244(13) – employee intoxication. Subsequently, on September 22, 2003, the Department filed a Complaint and Notice of Hearing regarding Talon's actions. On December 1, 2003, the matter went before an administrative law judge (hereinafter "ALJ"). On December 19, 2003, the Department's director issued an order, adopting the ALJ's findings of fact and recommendation of penalty. Plaintiff filed an appeal to the Department's Board, which was heard on March 4, 2004; the Board affirmed the Department's director's decision. Plaintiff now brings the matter before this court.

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[5] *DeGroot v. Arizona Racing Com'n*,141 Ariz. 331, 336, 686 P.2d 1301, 1306 (App. 1984).
[6] *City of Tucson v. Mills*, 114 Ariz. 107, 559 P.2d 663 (App. 1976).
[7] *Tucson Public Schools, District No. 1 of Pima County v. Green*, 17 Ariz.App. 91, 94, 495 P.2d 861, 864 (1972), as cited by *Petras v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981).

Issues & Analysis

The first issue is whether the statute prohibiting employee consumption of alcohol - A.R.S. §4-244(13) – exempts erotic dancers. After a careful review of Arizona law, I find that erotic dancers are exempt from this statute.

A.R.S. §4-244(13) reads:

> It is unlawful:
>
> For an ***employee*** of a retail licensee, during that employee's working hours or in connection with such employment, to give to or purchase for any other person, accept a gift of, purchase for himself or consume spirituous liquor, except that an employee of a licensee, during that employee's working hours or in connection with the employment, while the employee is not engaged in waiting on or serving customers, may give spirituous liquor to or purchase spirituous liquor for any other person. An unpaid volunteer who is a bona fide member of a club and who is not engaged in waiting on or serving spirituous liquor to customers may purchase for himself and consume spirituous liquor while participating in a scheduled event at the club. An unpaid participant in a food competition may purchase for himself and consume spirituous liquor while participating in the food competition. [emphasis added]

A.R.S. §4-101(14) defines "employee" for the Alcoholic Beverages section of the Arizona Revised Statutes:

> "Employee" means any person who performs any service on licensed premises on a full-time, part-time or contract basis with consent of the licensee, whether or not the person is denominated an employee, independent contractor or otherwise. **Employee does not include a person exclusively on the premises for musical or vocal performances**, for repair or maintenance of the premises or for the delivery of goods to the licensee. [emphasis added]

Courts must look first to a statute's language, for it is the best and most reliable index of a statute's meaning.[8] "If the language is plain, we need look no further."[9] The legislature set forth definitions in the Alcoholic Beverages section of the Arizona Revised Statutes to assist

[8] *State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993).
[9] *Id*.

judges and prosecutors in the interpretation and enforcement of the related statutes. A careful reading of the statute defining "employee" unambiguously exempts musical performers. To argue otherwise would entirely ignore the plain meaning of the statute, and attempt to spin the definition into whimsical interpretations to effect more violations. The court in *Padilla v. Industrial Commission*[10] thoroughly clarified the issue before the bar:

> The most basic rule of statutory construction is that in construing the legislative language, courts will not enlarge the meaning of simple English words in order to make them conform to their own peculiar sociological and economic views. And this is true even though the interpretation which the court renders is harsh and uncompassionate. Equally fundamental is the presumption that what the Legislature means, it will say.[11]

The legislature unequivocally defined "employee," and those exempted from employee status – those exclusively on the premises for musical or vocal performances. While the legislature did not define "musical performer," the dictionary provides a meaning of "musical." In determining the ordinary meaning of a word, courts may refer to an established and widely used dictionary.[12] The *American Heritage Dictionary of the English Language, Fourth Edition*[13] defines "musical" as:

1. Of, relating to, or capable of producing music: *a musical instrument.*
2. Characteristic of or resembling music; melodious: *a musical speaking voice.*
3. Set to or accompanied by music: *a musical revue.*
4. Devoted to or skilled in music.

The third definition will be the operative one in the matter at bar – "Set to or accompanied by music." The erotic dancers in Plaintiff's establishment are exactly that - *dancers*. It can not be disputed that the erotic dancers' performances are set to or accompanied by music, and in accordance with A.R.S. §4-101(14), these dancers are exclusively on the premises for musical performances. The State argues that the dancers in Plaintiff's establishment are "there for the primary purposes of interacting with patrons on the premises to earn money for themselves and to induce the patrons to consume alcohol."[14] This argument is dreadfully weak. Of course, the dancers are there to earn money for themselves; the legislature did not limit the musical performer exemption to only gratuitous performers. Further, to argue that the dancers are there

[10] 113 Ariz. 104, 546 P.2d 1135 (1976).
[11] *Id.* at 106, 546 P.2d at 1137.
[12] *State v. Mahaney*, 193 Ariz. 566, 568, 975 P.2d 156, 158 (App. 1999).
[13] Copyright 2000 - Houghton Mifflin Company.
[14] Defendant's Response Brief, p. 6, ll. 4-7.

exclusively to induce patrons to buy alcohol is speculative and unfounded. There are beverage servers in the erotic dancing establishments that serve the alcohol; the dancers do not serve alcohol. The dancers are there exclusively to perform to music and earn tips – it is that simple and plain. If the legislature wanted to exempt musical performers from A.R.S. §4-244(13), but not offer the exemption to those performing to music while topless, it would have said so - "what the Legislature means, it will say."[15]

The second issue raised by Plaintiff is whether A.R.S. §4-244(13) is unconstitutionally vague. As discussed above, A.R.S. §4-244(13), by its clear and unequivocal language, is not vague in any manner. Erotic dancers are musical performers, and are thus exempt from the employee prohibitions as found in A.R.S. §4-244(13). As to Plaintiff's concern of whether the statue is vague because it fails to address the distinction between an erotic dancer who is on the premises but not working, and an erotic dancer who is on a break, a statute that gives fair notice of the conduct to be avoided is not void for vagueness simply because it may be difficult to determine how far one can go before the statute is violated.[16] A statute is unconstitutionally vague if it fails to give a person of normal intelligence a reasonable opportunity to know what is prohibited.[17] It is clear that Talon (Plaintiff's employee) was working when she consumed the beer. She may have been on a break, but she was still at her place of employment, entertaining customers. It would be nonsensical to allow an employee to escape prosecution for drinking alcohol on the job simply by taking a break and punching out at the time clock, drinking alcohol, and then punching back in. It is not the responsibility of this court to declare invalid for vagueness every statute that it believes could have been written with greater precision.[18]

The third and fourth issues concern whether the Department's director had previously ruled that an ALJ should not consider cases like this. The record shows that the Department's director never issued such a ruling. The ALJ's comments, as quoted by Plaintiff, were mere dicta, and Plaintiff has misconstrued such, taking the dicta out of context.

IT IS ORDERED reversing the decision of the Arizona State Department of Liquor Licenses and Control, only for the reasons stated in this minute entry opinion.

IT IS FURTHER ORDERED granting the relief as requested by the Plaintiff in its complaint.

IT IS FURTHER ORDERED that counsel for the Defendant shall prepare and lodge a judgment consistent with this minute entry opinion no later than December 30, 2004.

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[15] *Padilla*, 113 Ariz. At 106, 546 P.2d at 1137.
[16] *Berenter v. Gallinger*, 173 Ariz. 75, 839 P.2d 1120 (App. 1992).
[17] *Id.*
[18] *State v. Takacs*, 169 Ariz. 392, 395, 819 P.2d 978, 981 (App. 1991).